Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

30. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[111] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[112] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

31. *Fixed Microwave Services.* Fixed microwave services include common carrier,[113] private operational-fixed,[114] and broadcast auxiliary radio services.[115] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other

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[111] *Id.*

[112] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[113] *See* 47 C.F.R. §§ 101 *et. seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[114] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[115] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

Telecommunications," which is 1,500 or fewer employees.[116] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

32. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[117] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[118] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[119]

33. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[120] The SBA has approved these definitions.[121] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

34. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[122] An additional size standard for "very small business" is: an entity that, together with affiliates,

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[116] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[117] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

[118] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[119] *Id.*

[120] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[121] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (filed December 2, 1998).

[122] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Rcd 18600 (1997), 63 Fed.Reg. 6079 (Feb. 6, 1998).

has average gross revenues of not more than $15 million for the preceding three calendar years.[123] The SBA has approved these small business size standards.124 The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

35. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[125] In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[126] The SBA has approved of this standard.[127] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[128] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[129]

36. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[130] which includes all such companies generating $12.5 million or less in annual receipts.[131]

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[123] *Id.*

[124] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration (filed January 18, 2002).

[125] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (*MDS Auction R&O*).

[126] 47 C.F.R. § 21.961(b)(1).

[127] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration (filed March 20, 2003) (noting approval of $40 million size standard for MDS auction).

[128] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O*, 10 FCC Rcd at 9608, para. 34.

[129] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[130] 13 C.F.R. § 121.201, NAICS code 517510.

According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[132] Of this total, 1,180 firms had annual receipts of under $10 million, *and an additional 52 firms had receipts of $10 million or more but less than $25 million.*[133] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

37. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[134] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

38. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[135] The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[136] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[137] The SBA has approved these small business size standards in the context of LMDS auctions.[138] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winners that won 119 licenses.

39. *218-219 MHz Service.* The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594

(Continued from previous page)

[131] *Id.*

[132] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[133] *Id.*

[134] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[135] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[136] *See id.*

[137] *See id.*

[138] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

Metropolitan Statistical Areas (MSAs).[139] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[140] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[141] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[142] The SBA has approved of these definitions.[143] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

40. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[144] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[145] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[146] Thus, under this size standard, the great majority of firms can be considered small. These broader Census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[147] and TRW, Inc. It is our understanding that Teligent and its related

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[139] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," Public Notice, 9 FCC Rcd 6227 (1994).

[140] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[141] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

[142] *Id.*

[143] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (filed January 6, 1998).

[144] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[145] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued October 2000).

[146] *Id.* The Census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[147] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

41. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[148] "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[149] The SBA has approved these definitions.[150] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

42. *Internet Service Providers.* While ISPs are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present FRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for ISPs. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others."[151] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[152] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[153] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[154] Thus, under this size standard, the great majority of firms can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

43. Pursuant to sections 251(c) and (d) of the Act, incumbent LECs, including those that qualify as small entities, are required to provide nondiscriminatory access to UNEs to requesting telecommunications carriers in certain circumstances.[155] In this Order, we modify our unbundling rules,

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[148] *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (24 GHz Report and Order); *see also* 47 C.F.R. § 101.538(a)(2).

[149] *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

[150] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration (filed July 28, 2000).

[151] Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 514191, "On-Line Information Services" (changed to current name and to code 518111 in October 2002).

[152] 13 C.F.R. § 121.201, NAICS code 518111.

[153] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[154] *Id.*

[155] 47 U.S.C. § 251(c), (d).

as described above. Specifically, we conclude, except as set forth in other Commission orders, that requesting carriers: (1) shall be afforded unbundled access to DS1-capacity dedicated transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines; (2) shall be afforded unbundled access to DS3-capacity dedicated transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines; (3) shall be afforded unbundled access to dark fiber dedicated transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines; (4) shall not be afforded unbundled access to entrance facilities in any instance; (5) shall be afforded unbundled access to DS1-capacity loops except in any building within the service area of wire centers with 60,000 or more business lines and 4 or more fiber-based collocators; (6) shall be afforded unbundled access to DS3-capacity loops except in any building within the service area of wire centers with 38,000 or more business lines and 4 or more fiber-based collocators; (7) shall not be afforded unbundled access to dark fiber loops in any instance; and (8) shall not be afforded unbundled access to mass market local circuit switching in any instance.[156] We also set forth specific transition plans to govern competitive carriers' migration from UNEs to alternative arrangements, where necessary. The various compliance requirements contained in this Order will require the use of engineering, technical, operational, accounting, billing, and legal skills. The carriers that are affected by these requirements already possess these skills.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

44. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[157]

45. In this Order, we adopt rules implementing section 251(c)(3) of the Communications Act, which requires that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2). As noted above, these rules respond to the D.C. Circuit's decision in *USTA II*.[158] Particularly, we focus on those items that the court remanded for our consideration.[159] Our actions will affect both telecommunications carriers that request access to UNEs and the incumbent LECs that must provide access to UNEs under section 251(c)(3).

46. In arriving at the conclusions described above, the Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of this Order, and made certain changes

[156] *See supra* Parts V, VI, and VII.

[157] 5 U.S.C. § 603(c)(1) – (c)(4).

[158] *USTA II*, 359 F.3d 554 (D.C. Cir. 2004).

[159] *See supra* para. 19.

to the rules to reduce undue regulatory burdens, consistent with the Communications Act and with guidance received from the courts. These efforts to reduce regulatory burden will affect both large and small carriers. The significant alternatives that commenters discussed and that we considered are as follows.

47. *Reasonably Efficient Competitor.* In this Order, we clarify that, in assessing impairment pursuant to the standard set forth in the *Triennial Review Order*, we presume a reasonably efficient competitor.[160] Specifically, we presume that a requesting carrier will use reasonably efficient technology and we consider *all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, taking into account limitations on entrants' ability to provide multiple services. This clarification, we conclude, will encourage facilities-based competitors, including small businesses, to deploy efficient technologies so as to maximize quality of service and minimize costs.[161] Thus, while we recognize that our approach might prevent inefficient small entities from using UNEs to compete (*i.e.*, in those cases where a reasonably efficient small entity would not require access to UNEs), we believe that the alternative approach, which would reward inefficiency and produce overbroad unbundling rules, would be inconsistent with the Communications Act.

48. *Service Considerations.* In response to the *USTA II* court's guidance, we revise our approach to unbundling for the exclusive provision of long-distance and mobile wireless services.[162] Specifically, we abandon the "qualifying services" approach set forth in the *Triennial Review Order*, which limited the section 251(d)(2) inquiry to a subset of telecommunications services and which was rejected by the D.C. Circuit. Based on the record, the court's guidance, and the Commission's previous findings, we find that the mobile wireless services market and long-distance services market are markets where competition has evolved without access to UNEs. We have therefore determined, pursuant to our "at a minimum" authority to consider factors other than impairment when assessing unbundling obligations, to prohibit access to UNEs for exclusive provision of service to those markets. We also considered, but declined to adopt, an approach also barring use of UNEs for provision of other services specified in the Act – namely, telephone exchange service and exchange access service, the two services LECs provide. We recognize that the use restrictions adopted in this Order may prevent small providers of mobile wireless and long distance service from using UNEs to compete. We conclude, however, that given the court's guidance, and the generally competitive state of the mobile wireless and long-distance markets, the benefits associated with unbundling would not be commensurate with the costs imposed on incumbent LECs, and would potentially depress deployment of new facilities that would ultimately redound to the benefit of all carriers and end-user customers of every size.

49. *Reasonable Inferences.* In this Order, we adopt an approach that relies, to a far greater degree than our previous analyses, on the inferences that can be drawn from one market regarding the prospects for competitive entry in another.[163] As described in detail in the Order, we rely, where possible, on correlations between business line counts and/or fiber collocations in a particular wire center, on the one hand, and the deployment of competitive dedicated transport or high-capacity loops, on the other. We have considered and rejected the alternative of relying only actual deployment in assessing unbundling

[160] *See supra* Part IV.A.

[161] *Id.*

[162] *See supra* Part IV.B.

[163] *See supra* Part IV.C.

obligations. As described more fully in the Order, we have concluded that the "actual deployment" approach would be impracticable to administer, would be inconsistent with the *USTA II* decision, and would overstate requesting carriers' UNE needs.

50. *Relevance of Tariffed Alternatives.* In this Order, we address the relevance of special access tariffed alternatives to the unbundling inquiry in the local exchange markets where we find UNE access to be appropriate. We find that statutory concerns, administrability concerns, and concerns about anticompetitive price squeeze preclude a rule foreclosing UNE access when carriers are able to compete using special access or other tariffed alternatives.[164] We also find that a competitor's current use of special access does not, on its own, demonstrate that that carrier is not impaired without access to UNEs. We note that to reach a different result would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs.[165] This decision is consistent with the interests of many small businesses, who claim, for example, that they cannot compete against incumbent LECs in the local exchange markets using tariffed alternatives to UNEs.[166]

51. *Dedicated Transport.* In this Order, we limit unbundled access to dedicated transport to those routes on which competitive deployment at a particular capacity level is not economic.[167] Specifically, we find that competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines, and that competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, we find that competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance.

52. In reaching our decisions concerning dedicated transport, we considered the comments by small competitive LECs, which generally sought broader unbundled access to dedicated transport links.[168] We rejected these arguments, finding that they failed to account adequately for the prospects of competitive deployment and for the advantages held out by such deployment, where feasible, for consumers and carriers alike. Similarly, we also rejected a "matched pair" approach that would require the existence of actual competitive transport links (whether direct or indirect) before relieving an incumbent's unbundling obligations, because that approach failed to draw reasonable inferences regarding potential deployment. Alternatively, we also considered and rejected arguments that we should employ higher business line and fiber-based collocator thresholds in assessing impairment. While these higher thresholds might have minimized unbundling obligations and thus benefited small (and large) incumbent LECs, we believed that higher thresholds would *understate* the need for unbundling, and would prohibit UNE access on

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[164] *See supra* Part IV.D.

[165] *See id.*

[166] *See e.g.*, SBA Comments at 5; SouthEast Comments at 5-10 (quantifying the cost of loops and transport obtained through special access tariffs); Covad Comments at 74 (stating special access prices that the incumbent LECs charge for DS1 and DS3 transport prohibits competition); Mountain Telecommunications Comments at 5.

[167] *See supra* Part V.

[168] *See, e.g.*, SouthEast Comments at 5.

routes where competitive deployment was not economic. Finally, we considered but rejected alternative proposals to adopt conclusions regarding transport that would apply to entire MSAs. A single MSA can encompass urban, suburban, and rural areas, each of which presents different challenges to competitive LECs seeking to self-deploy facilities. Thus, while we recognize that MSA-wide determinations might confer administrability-related efficiencies on small entities, we believe that our more specific route-based approach is also easily administered, and permits a greater degree of nuance in assessing unbundling obligations.

53. *High-Capacity Loops.* We find that competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators.[169] Furthermore, competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Finally, we determine that competitive LECs are not impaired without access to dark fiber loops in any instance.

54. As with dedicated transport, we have considered and rejected proposals to adopt either more restrictive or less restrictive unbundling rules, which we recognize might benefit small incumbent LECs or small competitive LECs, respectively. For reasons explained in the Order, we believe our choice of thresholds properly assesses the prospects for competitive duplication of loops at the DS1 and DS3 capacity, incorporating reasonable inferences regarding potential deployment of such facilities from the areas in which competitors actually have deployed high-capacity loops. We have also considered, and rejected as unadministrable, a building-specific approach to loop impairment. While the building-specific approach might allow more nuance than the approach we have chosen, we believe that it would be impracticable to administer, and would invite protracted conflict between carriers as to whether or not unbundling was permitted in each particular building. Such disputes would benefit no party, and might in fact impose disproportionate costs on small incumbent LECs and competitive LECs. Finally, we have considered, and rejected, proposals that we evaluate impairment for high-capacity loops not by wire center, but by broader geographic areas, such as MSAs. As noted above, a single MSA can encompass wide areas presenting a range of topographies and customer densities, and thus a variety of distinct circumstances with regard to the prospects for competitive deployment. As explained in the Order, we believe that our wire-center approach to evaluating impairment with regard to high-capacity loops strikes the proper balance between administrability and case-specificity.

55. *Mass Market Local Circuit Switching.* We find that incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching.[170] Many commenters suggested a variety of alternatives to this rule, several of which were intended to mitigate the rule's effect on small competitive LECs. Specifically, we considered and rejected arguments that small competitive LECs are impaired in specific circumstances due to unique characteristics of the particular customer markets or geographic markets they seek to serve or because of the competitive carrier's size.[171]

[169] *See supra* Part VI.

[170] *See supra* Part. VII.

[171] *See, e.g.*, Dialog Comments at 2-4 (alleging that competitive LECs are uniquely impaired when seeking to serve rural areas); SouthEast Comments at 3-5 (same); USA Telephone Comments at 3-4 (same); Pennsylvania Consumer Advocate Comments at 13 (same); Dialog Comments at 7-8 (alleging that competitive LECs are uniquely impaired when seeking to serve residential customers); Momentum Comments at 5-14 (same); Ohio Consumers' Council Comments at 12-18 (same); American Public Communications Council *et al.* Comments at 23-26 (alleging that competitive LECs are uniquely impaired when seeking to serve payphone service providers); WorldNet Comments (continued....)

For instance, some commenters argued that competitive LECs are uniquely impaired when seeking to serve rural areas.[172] We concluded that these commenters' claims were at odds with our impairment standard, which evaluates impairment based on a "reasonably efficient competitor," not based on the individualized circumstances of a particular requesting carrier, and "consider[s] all the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all *possible services that an entrant could* reasonably expect to *sell.*"[173] Moreover, to the extent that small competitive LECs are harmed by our decision not to permit unbundled access to mass market local circuit switching, we believe that the attendant increase in incentives to deploy facilities justify a bar on unbundling even where the competitive carrier might be "impaired," and thus believe it is appropriate to invoke our "at a minimum" authority to prohibit unbundling in these cases. Although we recognize that some small carriers might find it more difficult to compete without unbundled access to switching, we believe that the corresponding increase in deployment incentives – for incumbent LECs and competitors alike – justifies our approach here.

56. We have also considered comments that ask the Commission to minimize the impact of our decision on small businesses by imposing particular requirements regarding the incumbent LEC hot cut process.[174] However, as explained above, the record demonstrates that the incumbent LECs from whom competitive carriers are receiving unbundled switching in almost all cases – *i.e.*, the BOCs – have a record of providing hot cuts on a timely basis and have made significant *improvements* in their hot cut processes that should enable them to perform larger volumes of hot cuts to the extent necessary.[175] We believe that the improvements in the hot cut process will ultimately benefit small businesses and should ensure a smooth transition away from mass market switching UNEs.

57. *Transition Plans.* The Order also sets out transition plans to govern the migration away from UNEs where a particular element is no longer available on an unbundled basis. We have considered various comments indicating that many small businesses have built their business plans on the basis of continued access to UNEs and have worked to ensure that the transition plans will give competing carriers a sufficient opportunity to transition to alternative facilities or arrangements.[176] This alternative represents a reasonable accommodation for small entities and others, which we believe will ultimately

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(alleging that competitive LECs are uniquely impaired in Puerto Rico); SBA Comments at 5-7 (alleging that small competitive LECs would be particularly affected by the elimination of UNE-P); National ALEC Association Reply at 6 (same); *see also* Letter from Karen Kerrigan, President and CEO of Small Business Entrepreneurship Council, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 04-313 (filed Nov. 30, 2004) (urging the Commission to preserve access to dark fiber and high-capacity loops and transport, and providing a clear migration path for carriers using UNE-P to serve small business consumers).

[172] Dialog Comments at 2-4.

[173] *See supra* para. 24.

[174] *See supra* Part VII.C.2. For instance, SBA's request that, if switching were eliminated from the list of UNEs, the Commission should minimize the impact on small businesses by "tightening the rules involving hot cuts." *See* SBC Comments at 6; Dialog Comments at 8 (a finding of non-impairment must be conditioned on continuing performance of hot cuts); CompTel ASCENT Comments at 44 (arguing that hot cut problems justify a finding of non-impairment).

[175] *See supra* paras. 210-21.

[176] *See, e.g.*, SBA Comments at 6-7.

result in an orderly and efficient transition. Therefore, as set forth in the Order, we have adopted plans to retain unbundled access to dark fiber loops and dark fiber dedicated transport for 18 months, at rates somewhat higher than those at which a carrier had access to those UNEs on June 15, 2004, and to retain unbundled access to DS1 loops, DS3 loops, DS1 dedicated transport, DS3 dedicated transport, and mass market local circuit switching for 12 months, again at rates somewhat higher than those at which a carrier had access to those UNEs on June 15, 2004. We believe that these plans offer sufficient time in which a competitive LEC can determine which specific arrangements must be transitioned and establish alternative means of serving customers currently served using those arrangements. We therefore reject proposals that we adopt longer transitions,[177] which we believe would be unnecessary and therefore inappropriate in the face of a Commission declining to unbundle the element at issue.

F. Report to Congress

58. The Commission will send a copy of the Order on Remand, including this FRFA, in a report to be sent to Congress and the Comptroller General pursuant to the Congressional Review Act.[178] In addition, the Commission will send a copy of the Order on Remand, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Order on Remand, including this FRFA – or summaries thereof – will be published in the Federal Register.[179]

[177] Commenters suggest various transition plans. For instance, Dialog requests that UNE-P be available for three years for those competitive LECs that are small businesses, as defined by the SBA. Dialog Comments at 12. Others, such as Michigan Based Coalition recommended that, "once a threshold condition is reached, affected [competitive LECs] would have 12 months to transition from the UNE model prescribed by the Act to alternative methods." Michigan Based CLEC Coalition Comments at 8; *see also, e.g.*, SBA Comments at 6; PACE *et al.* Dec. 6, 2004 *Ex Parte* Letter at 4-5.

[178] 5 U.S.C. § 801(a)(1)(A).

[179] *Id.* § 604(b).

SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

RE: Unbundled Access to Network Elements (WC Docket No. 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)

Today's decision crafts a clear, workable set of rules that preserves access to the incumbent's network where there is, or likely will be no other viable way to compete. The rules have also been carefully designed to pass judicial muster, for I hope we have learned that illegal rules, no matter their other merits, are no rules at all. For eight years, the effort to establish viable local unbundling rules has been a litigation roller coaster. Regrettably, years of fierce battles to bend the rules entirely toward one sector or another without proper respect for the legal constraints have contributed to a prolonged period of uncertainty and market stagnation.

This item decidedly does not attempt to make all sides happy. Consequently, one will undoubtedly hear the tortured hand-wringing by incumbents that they are wrongly being forced to subsidize their competitors. They have a legal duty to provide access under limited conditions and they do protest too much in arguing for the end of vast portions of their unbundling requirements. Conversely, one can expect to hear dire predictions of competition's demise from those who wanted more from this item. Time will show this will not be so. Business models may change, but competition and choice for consumers in the information age will continue to grow and thrive.

After repeated defeats in court, the Commission has heeded the call to apply a meaningful impairment analysis to switching. Therefore, while commercial agreements can be established to offer UNE-P services, such services are no longer legally compelled. We recognize, however, that during the years of wrangling over the lawfulness of UNE-P, companies have sold phone service to significant numbers of consumers using this now thoroughly legally discredited business approach. While we cannot justify the continuation of this approach, we see the need and obligation to minimize the impact on consumers by providing a smooth transition of these customers to other alternatives. To accomplish this, we have adopted a significantly longer transition than first proposed. In addition to the six months already provided by our Interim Order, we will extend the transition into early 2006. We are confident this will mean less disruption for customers and provide time for quickly emerging alternatives—not the least of which include cable telephony, wireless and VoIP—to root in the market.

Facilities competitors are favored under the Act and Commission policy and we have attempted to permit wide unbundling for the key elements of loops and transport, where there is clear and demonstrable impairment. Recall that two years ago all five Commissioners stood together in requiring substantial unbundling of virtually all loops and transport. The Court rejected that effort. So today we have tried again to satisfy the court, while preserving access to incumbent's networks outside the most competitive and densest business districts. Incumbents made forceful attempts to remove the majority of these elements, but the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances. We did not just check off the CLEC holiday list, however, and were careful to draw the lines tightly, understanding the rigors of the statutory impairment test and the inevitable need to withstand judicial challenge. Where loops or transport are removed, we also provide substantial transition periods to avoid disruption.

Over the course of the past few months, the five commissioners have worked very hard together to craft a solution that all of the offices could support. Ultimately, although my colleagues' insights and proposals improved the final result, we could not bridge the gap to reach a unanimous result that I felt could pass judicial muster. Finally I would be remiss if I did not praise the extraordinary efforts and leadership of the Wireline Competition Bureau and our Office of General Counsel, particularly Jeff Carlisle, Austin Schlick, Michelle Carey, Tom Navin, Russ Hanser and Jeremy Miller. They have been tireless advocates for a rigorous decision that advances the public interest. We all owe them a debt of gratitude.

In 1996, no one could have guessed that nearly a decade later the FCC would be on its fourth attempt to develop local competition rules that are lawful. We hope to end that here and now, for the market cannot possibly continue another day plagued by an ever-shifting regulatory foundation. We can only hope that the fourth time is the charm.

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand

Section 251 of the Communications Act directs the Commission to make unbundled network elements available to competitors, but it provides little guidance as to *which* elements should be made available in *which* markets. Three times in the past eight years the Commission has endeavored to answer those bedeviling questions, and three times our rules have been rejected as overbroad by the courts of appeals (including by the U.S. Supreme Court). Regardless of one's policy views regarding the appropriate degree of mandatory unbundling, we must put an end to the debilitating cycle of court reversals and the resultant marketplace uncertainty. As a veteran of the competitive sector, I have great sympathy for carriers that crafted business plans in compliance with our rules, only to have the rug later pulled out from under them. The only responsible solution to this problem is to adopt rules that comply faithfully with the decisions of the D.C. Circuit and the Supreme Court, so that we can *finally* move forward with stable rules in place.

Notwithstanding that non-negotiable constraint on our discretion, the Commission worked hard to find ways to make transmission facilities available wherever true bottlenecks exist, consistent with the court's guidance. Building on our earlier decisions to eliminate unbundling obligations for most broadband facilities and optical-capacity transport and loop facilities, we have phased out the unbundling of circuit switching and significantly curtailed unbundling of higher-capacity (DS-3 and dark fiber) transmission facilities. These decisions recognize, as the court directed, that the costs of unbundling outweigh its benefits in markets where high revenue potentials have already led to significant competition or create a strong potential for it to develop. At the other end of the spectrum, we have established an obligation to unbundle the vast majority of DS-1 loop facilities, and significant amounts of DS-1 transport, in light of the many factors that typically make duplication of such facilities uneconomic. In short, while the issues are extremely complex and defy facile solutions, the Order we are adopting succeeds in promoting facilities-based competition while faithfully complying with judicial mandates.

Where I part ways with my dissenting colleagues is my unwillingness to vote for proposals — such as nationwide impairment findings or tests that focus exclusively on actual competition, to the complete exclusion of potential competition — that are flatly inconsistent with the D.C. Circuit's decision in *USTA II*. That decision is unquestionably the law of the land, and we are duty-bound to adhere to it. Were it not for past overreaching, the D.C. Circuit in all likelihood would have accorded us greater deference and also refrained from *vacating* (as opposed to merely remanding) our unbundling rules. In any event, it would be a pyrrhic victory for competitive carriers if the Commission at this stage were to reinstitute unbundling frameworks that have already been rejected and cannot be sustained on appeal. The ensuing disruption and dislocation that would result — particularly if the court did not permit a further freeze on unbundling requirements that are vacated once again — would prove crippling to the competitive industry. I am confident that this Order on Remand, by contrast, can serve as the blueprint for sustainable facilities-based competition, and, in turn, a high degree of innovation, choice, and other consumer benefits.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (WC Docket No. 04-313, CC Docket No. 01-338)

We are living in a new world when it comes to wireline competition. It is not a world of my making or my choosing, and I am deeply troubled by the conviction that this new world will be characterized by dramatic changes that will negatively impact American consumers. In decision after decision over the past three years, this Commission has taken actions curbing competition and limiting consumer choices, in the process straying far from the paradigms of competition laid out in the Telecommunications Act of 1996.

Our challenge today is to craft rules that will be acceptable to the courts and true to our statutory directives. I entered this remand proceeding hopeful that we could reach a compromise that would ensure some future for competition among wireline service providers and to provide a decent future for facilities-based carriers. We have had a long and serious dialogue over this item, extending through most of the night and right into today. I appreciate my colleagues' willingness to engage in this discussion and to make the effort to achieve consensus. Unfortunately, in the final analysis, consensus eluded us. I thought we were getting close, but we couldn't cross the finish line. I cannot support the decision that resulted.

What we have in front of us effectively dismantles wireline competition. Brick by brick, this process has been underway for some time. But today's Order accomplishes the same feat with all the grace and finality of a wrecking ball. No amount of rhetoric about judicially sustainable rules and economically efficient competitors can hide the blockbuster job this Commission has done on competition. During its tenure, the largest long distance carriers have abandoned the residential market. And as a result of today's decision, other carriers will follow suit. In their wake we will face bankruptcies, job losses and customer outages. Billions of dollars of investment capital will be stranded. And down the road consumers will face less competition, higher rates and fewer service choices.

After having abandoned residential competition earlier, today the majority also hangs up on small business consumers. Small business likes competition. It has voted with its feet for competition. In fact, the Small Business Administration tells us that in metropolitan areas competitive carriers serve 29 percent of small businesses. The inroads competitive carriers have made in this community are important, because small business is the engine of our economy. Small businesses generate between two-thirds and three-quarters of all new jobs in this country. They represent over 90 percent of employers and they produce over half of the nation's private sector output. The savings they enjoy from competitive telecommunications services go straight to the bottom line. But the majority's action today pulls the bottom out from under small business competition. It places restrictions on access to high-capacity loop and transport facilities that are vital for carriers serving small businesses. It imposes economically unsound tests. In short, it burns the bridges competitive carriers have made in serving the small business community.

For a Commission that has laced its decisions with praise for facilities-based competition, today's action is a funny way of showing its continued support. As a result of this decision there will be less competition, less choice and higher rates. The people who pay America's phone bills deserve better. I dissent.

Some would have us believe that this is the road we have to travel in the wake of court decisions. Yet it is this Commission that refused to seek review of the very court decisions they now claim constrain us.

Though I do not join this decision today, I wish to thank the Commission staff for their hard work on this item. This proceeding—and its predecessor—have not been easy. But throughout the Bureau has been helpful, candid and generous with their time. I am grateful for their devotion to the task at hand and hope that there is some well-deserved time for rest and relaxation in the weeks ahead.

DISSENTING STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: *Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-290.*

With this Order, the Commission officially cuts the cord on the local competition provisions of the Telecommunications Act of 1996, the companies and investors which sought to deliver on the promise of the Act, and the American consumers to whom that promise was made. By fundamentally undermining Congress's vision of competition, the Commission chooses the path of higher rates and fewer choices for both residential consumers and small businesses.

By not defending the Commission's prior decision before the Supreme Court, the majority placed itself in a box, unnecessarily limiting its own ability to promote competition. As the majority now seeks to bury burgeoning telecom competition six feet under, the only choice I was given was where to pound in the nails.

As we have implemented the local competition provisions of the 1996 Act, I have sought to take a careful and balanced view of the benefits and burdens of our unbundling rules. The record here, however, overwhelming demonstrates that competitors need access to critical bottleneck elements from the incumbents' legacy networks in order to connect their networks to their customers. Yet, today the Commission denies access to those elements with an overbroad decision that is divorced from the requirements of the statute, the direction of the courts, the evidence in this record, and the realities of providing telephone service.

Most stark is the Commission's treatment of local loops, which carry telephone traffic from customers' locations to a service provider's network. These local loops act as the on and off ramps to reach the alternative facilities-based networks that competitors have constructed at considerable expense. In this Order, the Commission adopts a wire center-based approach for these elements that is disconnected from the operational and economic barriers a competitor would face if it had to duplicate the incumbent's legacy network. While the majority insists that this approach is compelled by the courts, the majority adopts an overly restrictive reading of the precedent and adopts rules that do not track the statutory touchstone of impairment. By cutting facilities-based competitors off from access to essential network elements, the Commission undermines choice for small and medium size business customers across the country, let alone all consumers. In my view, these small business customers, who are so central to our nation's economic growth, have yet to realize the wave of rate increases to come.

Nowhere, though, will this disconnection be as pronounced as in the largest metropolitan markets. These are areas where competitors have been able to gain a tenuous but growing foothold, building out their own networks closer to consumers, just as this Commission repeatedly encouraged them to do. Investors, who have committed billions of dollars of private investment in facilities-based wireline competition, have argued persuasively that the type and locations of their facilities were selected precisely to mesh with loop and transport elements leased from incumbent carriers as unbundled network elements pursuant to the Act. These investors have emphasized that their investments are "essentially worthless" and that "further investments will not be forthcoming," without access to those elements leased from the incumbents.

The message from the facilities-based competitive industry has been clear: this Order will be devastating. It will create dislocation not only for telecommunications companies and their employees, but it will disrupt service for thousands of businesses that rely on them. Given the importance of the cutting-edge services these upstarts provide, this decision is bound to be a drag on the growth of our overall economy. While some argue it will spur investment, it is more likely to diminish it, as competitors who would otherwise invest are forced out of business and incumbents face less pressure to respond to their offerings.

Today's decision also marks the demise of UNE-based competition for residential consumers. For millions of residential consumers, that translates into fewer choices and higher prices. The majority concludes here that this residential competition, predicated on the availability of unbundled local switching, is unsustainable under existing legal precedent. Despite these protestations, the majority all but ensured this result.

I note with appreciation that the majority at least took some of our suggestions. Applying strict eligibility criteria to stand-alone UNE loops would have drastically limited competitors' ability to provide data services, which this Commission has touted as the future of the telecommunications market. Also, I appreciate the majority's willingness to extend slightly the transitions available to competitors who have invested so much in the effort to fulfill the goals of the 1996 Act. I would have supported relief more in line with the Commission's transition approaches used in other proceedings, where the Commission has been granted great deference to fashion transitional remedies.

Moreover, I have serious concerns that consumers may experience unnecessary service disruptions as their providers of choice are forced to exit the marketplace or as carriers rush to convert to new systems. To safeguard against this upheaval, it will be imperative that our State commission colleagues monitor the re-absorption, like the proverbial rat in a python, of millions of consumers who have chosen competitive alternatives. Our failure to address this possibility more comprehensively shows unnecessary disregard for consumers who have signed up with competitors -- for such disruptions would come through no fault of their own.

While I strongly dissent from this Order, I want to thank my colleagues for their candor in approaching these issues. I am deeply disappointed that we cannot find common ground on this result, but I respect their opinions and our dialogue. Some may argue the dissenters drove too hard a bargain and let the perfect be the enemy of the good. I weighed heavily this concern but cannot agree. The disconnect between the Commission's pro-competitive statements and the anti-competitive policies adopted here is too wide to sanction. The Commission's lofty promises and assurances directed this summer at facilities-based competitors ring hollow in this Order. Beyond rhetoric, the harm to competition and consumers is too great a price for the constrained and ineffectual approach outlined in this Order. Finally, I find this Order dismissive of Congress's vision that the 1996 Act would allow facilities-based competitors to grow and to get a foothold in the market by relying on elements like loops and transport that they need to do business. For all these reasons, I respectfully dissent.